42844-0-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

State of Washington
Appellant

v.

TAWANA LEA DAVIS
Respondent

42844-0

On Appeal from the Kitsap County Superior Court

Cause No. 11-1-00248-7

The Honorable Sally F. Olsen

REPLY BRIEF

Jordan B. McCabe, WSBA # 27211
For Appellant, Tawana L. Davis

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II. STATEMENT OF THE CASE

Tawana Lea Davis, was convicted of meth-related offenses based solely on a series of fatally defective "controlled" buys. She challenges the sufficiency of the evidence, either as probable cause for a search warrant to search her dwelling or as substantive evidence guilt.

The Chieftain Motel was a notorious Bremerton drug nest in a drug-infested area. RP 232. In late 2010, and early 2011, Tawana Davis lived and worked there. RP 194. The police recruited Laura Sutton and Robert White to do controlled buys from Ms. Davis. Both were meth addicts and members of the Chieftain drug community. RP 30, 47, 51.

Laura Sutton was facing drug charges with an offender score of 10. RP 30. She entered a so-called "three-for free" deal to conduct multiple buys with three suppliers in exchange for a recommendation of leniency. RP 313. Robert White's incentive to curry favor with the police was to obtain leniency for his girlfriend who was facing drug charges. RP 47, 51.

The layout of the Chieftain Motel did not permit the standard protocol for a controlled buy. Instead, the Bremerton police would meet with a CI near the motel, search the CI's body and vehicle and provide recorded bills. The CI would then drive to the Chieftain, park, and go inside. RP 146-49. The handlers had no way to monitor CIs once they left the parking lot. The police could not control where they went, what

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they did, or with whom. RP 178-79, 281-82. The officers simply had to accept whatever story the CI told them. Accordingly, the only evidence that the suspect had even been contacted was the CIs' uncorroborated word and the fact that they disappeared from view with money and no drugs and returned with drugs and no money.

Laura Sutton claimed to have done buys with Davis on November 16 and December 3, 2010, in Room 108. RP 164, 326. Robert White claimed to have bought from Davis on December 30, 2010, in a parking lot and again on January 14, 2011, in Room 102. CP 46; RP 219.

The police obtained a search warrant for Room 102. CP 261. They found some meth residue, a couple of scales and some alleged packaging material. RP 83.

Davis was convicted by jury of three counts of delivering, one count of possession, and one count of making her premises available for drug offenses, all within 1,000 feet of a school bus stop and a school. CP 26-31, 92-94, 95-98. She appeals.

III. ARGUMENTS IN REPLY

1. THE SO-CALLED "CONTROLLED BUYS" WERE NOT CONTROLLED.

The State claims that evidence can be simultaneously insufficient to prove guilt beyond a reasonable doubt. Brief of Respondent (BR) 18.

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This is wrong. The State's sole authority is found in the unpublished portion of *State v. Foster*, 140 Wn. App. 266, 166 P.3d 726 (2007). A party may not cite an unpublished opinion. RAP 10.4(h); *Foster*, 140 Wn. App. at 278. The Court will strike this argument from the State's Brief. *See, e.g., State v. Seek,* 109 Wn. App. 876, 878, n.1., 37 P.3d 339 (2002).

Moreover, *Foster* is distinguishable. *Foster* concerns two buys. In the first, the police observed Turner and Wilson enter the apartment of Smith, where Foster sold them drugs. *Foster*, 140 Wn. App. at 269. Foster did not claim, and the facts presented do not suggest, that the police could not see Smith's apartment. By contrast with Davis, the informants did not disappear inside a virtual "black box" occupied by meth-trafficking friends and acquaintances. The second *Foster* buy, took place in Foster's trailer. Again, the facts on appeal do not suggest that the police could not observe the trailer. There is no suggestion that Turner had other contacts at the trailer park from whom he could have bought drugs. *Foster*, 140 Wn. App. at 270.

Moreover, Foster's sufficiency challenged rested entirely on the fact that Turner, as a paid informant, did not satisfy the *Aguilar-Spinelli* reliability test. *Foster*, 140 Wn. App. at 278 (unpublished portion.)

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In addition to claiming the controlled buys were fatally defective, Davis included a superfluous argument that Sutton and White were not reliable under *Aguilar-Spinelli*.[1] Appellant's Brief (AB) 11. The test for evidence obtained in a controlled buy, however, is not *Aguilar-Spinelli*.

The elements of an effectively controlled buy are discussed in *State v. Casto*, 39 Wn. App. 229, 234, 692 P.2d 890 (1984). Rather than focusing on the informant, the reliability issue is whether the alleged controls are sufficiently reliable to corroborate allegations by an inherently untruthful informant. *State v. Maddox*, 116 Wn. App. 796, 803, 67 P.3d 1135 (2003). And merely searching the informant before and after the buy is not good enough. To eliminate the possibility that a CI obtained alleged evidence from a source other than the defendant or in a place other than the defendant's dwelling, the police must observe the informant actually enter and leave the buy location. *Maddox*, 116 Wn. App. at 803.

Here, the buy evidence is worthless because the buys were not controlled. Contrary to the prosecutor's erroneous argument to the jury, the lack of meaningful surveillance is not cured by before and after searches of the CI. RP 672-73.

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[1] *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) & *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

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Det. Musselwhite himself established that a valid controlled buy requires uninterrupted surveillance from multiple viewpoints. RP 149, 162. Yet these informants were completely out of sight at all relevant times. All we know is that each CI took buy money into a notorious hive of drug activity, disappeared from view, and reappeared some time later with drugs. The buys essentially took place in a black box.

The State conceded that Sutton showed up for the first purported buy with meth and paraphernalia in her purse and car and lied about them. RP 32, 34, 171, 452. She continued using drugs and dealing between one buy and the next. RP 43. Sutton's best friend, Barbara Ivy, lived at the Chieftain. The State conceded that Ivy was supplying Sutton with drugs during the relevant time. RP 44-45, 120, 313-14. Sutton even admitted having bought drugs from Barbara Ivy at the Chieftain motel before she went to Davis's room to do the buy. RP 113-14. She told a defense investigator she did drugs with Ivy at the Chieftain later that night. RP 40.

Sutton's second visit took so long that Musselwhite called to ask what was going on. BR 9, citing RP 203-03. The following day, Sutton was arrested for selling methamphetamine to another CI. RP 33.

The State claims Sutton should be trusted because she made statements against penal interest and had no reason to lie. BR 3. This is ingenuous and false. Sutton was facing long-term incarceration and

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cooperated solely in the hope of favorable treatment. RP 167-68. The record does not suggest that she admitted anything the police could not prove. She had every reason to lie. She was serving a sentence of 100 months and had been promised a recommendation for leniency in exchange for her testimony. RP 28, 31, 167. In addition to her many prior drug-related felony convictions, Sutton had convictions for forgery, identity theft, and a few misdemeanor thefts. RP 169. In other words, she was known to be a practicing meth addict, liar, cheat and thief.

The State seems to attach relevance to whether the target is a "quality suspect." BR 3. This is wrong and misrepresents this record. A valid controlled buy must produce quality evidence. It is the credibility of the confidential informant and the reliability of the buy protocol that must be "quality." The "evidence has to be quality, which means we have to believe that the information is credible and reliable and that the people are reliable." Det. Musselwhite at RP 157.

The State claims that Sutton's immersion in the drug culture enhanced her reliability because she was able to recognize drugs when she saw them. BR 4. But the basis of Sutton's familiarity with the trappings of drug abuse and trafficking is not the issue. The question is whether her reliability as an informant was fatally compromised by her glaring motive

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to lie and her unrestricted opportunity to take Musselwhite's money and fake the result he wanted.

The State also appears to argue that removing contraband from Sutton's car before the first buy somehow added credibility to her claim that she engaged in a transaction with Ms. Davis. BR 6. It does not. However squeaky clean Ms. Sutton was when her handlers lost sight of her, the buy lacked any effective controls. Likewise, the State implies that discussing matters with Sutton and searching her after the purported buy constitutes some sort of control that bolsters the reliability of the evidence against Davis. BR 8. This is illogical and simply false. Sutton was on familiar turf with essentially unlimited opportunities to manipulate the so-called controlled buy, leaving the police with nothing but their touching faith in her sincerity to support probable cause.

The State seems to suggest that the police successfully deceived Ms. Sutton into believing she was being watched. BR 6. This is pure wishful thinking. Probable cause cannot depend on the fantasy that either of these CIs would be fooled by a police officer's claim that they could be observed. The State concedes that the police lost sight of Sutton once she got out of her car in the parking lot and that effective surveillance was not possible. BR 7. It is inconceivable that Sutton did not know this.

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The State claims that Musselwhite could see all but a few rooms of the motel. BR 8. This misrepresents the record and is false. Musselwhite testified merely that he could see the front of the motel with the exception of a few front-facing rooms. Most of the motel, including all rear-facing rooms, was completely hidden from view. RP 281. The police could not control the buys from the time the CIs left the parking lot until they returned to it after doing whatever they did in the motel. RP 179-80.

Robert White's alleged buys were equally compromised. As with Sutton, White had a strong incentive to curry favor with the police to obtain a positive recommendation for charges that his girlfriend was facing. BR 10, citing RP 207. And, as with Sutton, Musselwhite could not observe White except in the motel parking lot. CP 266. Flush with Musselwhite's money and unobserved by his handlers, White enjoyed complete freedom of movement inside the Chieftain. RP 398, 401. Having done three previous buys, BR 10, citing 207, White knew all about Det. Musselwhite's "controls."

White returned from the first alleged Davis buy with a bag of "bunk," a substance that was the wrong color and the wrong consistency and looked nothing like methamphetamine. RP 211. White claimed not to have noticed this, and Det. Musselwhite believed him because substitutions were a common feature of his controlled buys. RP 212, 215-

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216. Of all the possible scenarios, Musselwhite simply assumed that White had engaged in a transaction with Davis and that Davis cheated him. BR 11, citing RP 212-13. The jury did not believe White's story and acquitted Davis of Count III, delivery of a non-controlled substance in lieu of a controlled substance. CP 92. The court erroneously kept from the jury the fact that White tried to steal controlled by drugs in an unrelated transaction by hiding meth in his mouth. RP 47.

White could not resist trying to steal drug evidence obtained in his controlled buys. RP 47. He did it in the Davis buy on January 14, 2011, (cited as probable cause for the search warrant) by hiding almost half of the drugs under a jacket in the back seat of his car. RP 47-48.

After the "bunk" fiasco, White was wired with a video camera for a second buy on January 14, 2011. RP 218. Although police technicians checked the device and found it to be in good working order, lo and behold! it mysteriously malfunctioned just at the critical moment when White got out of his car and disappeared from view. BR 13, citing RP 223. Again, this did not arouse the suspicions of Musselwhite and company, because it happened to them all the time. RP 222-23. Rather than concluding that the scouting report around the Chieftain was that these investigators were patsies, they simply rationalized that honest and

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reliable CIs naturally tend to be inattentive when nervous and that their camera was sensitive and unreliable. RP 482-83.

White showed up on the second occasion with a barely half the quantity of meth he had received buy money for. Purloined meth was all over the back seat of his car, and eventually White admitted stealing the drugs. CP 267; RP 220, 227.

Musselwhite testified that informants who violate controlled buy protocol should not be used because they can no longer provide reliable information, especially where, as here, they compromise the integrity of the investigation. RP 160-61. But information about these alleged buys came solely from people who flouted even the transparent and inherently unreliable controls that were attempted. RP 653.

White, like Sutton, was familiar with the layout of the Chieftain Motel. He was a regular habitué whose girlfriend used to live there. RP 392, 395. Like Sutton, his movements inside the motel were unrestricted unmonitored, and uncontrolled. RP 398, 401. As with Sutton, Musselwhite discussed the plan thoroughly with White before and after White left the range of Musselwhite's ability to control anything. BR 11, citing RP 209, 211.

The logic of Musselwhite and Plumb brings to mind a Yiddish folk tale about a man who stops to help a neighbor searching under a street

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lamp on a snowy winter's night for a lost ring. After an hour of fruitless scrabbling in the snow, the good Samaritan asks —

"Are you sure this is where you dropped the ring?"

"No," comes the reply.

"So, why are we looking here?"

"Well," says his friend, "this is where the light is."

Likewise, in their earnest desire to clean up the Chieftain Motel wit no possibility for an effective investigation, the police simply employed the strategies that were available. But no reasonable juror could be satisfied that these buys were controlled in the sense of providing proof beyond a reasonable doubt of any disputed fact. Likewise, no reasonable magistrate could have regarded the reports of Sutton and White as substantial evidence sufficient to establish probable cause. To argue otherwise is wishful thinking.

The jury acquitted Davis of delivering ersatz methamphetamine to White on December 30, 2010, but convicted her of selling to him on January 14, 2011. CP 93. The record suggests no reason why, if the jury thought White lied about the bunk episode charged in Count III, they could be convinced beyond a reasonable doubt that he was telling the truth about Count IV. The evidence is insufficient to convict Davis of delivery to these informants. Because of the fatal procedural defects, evidence

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obtained in the course of the supposedly controlled buys was insufficient as a matter of law as substantive evidence that Davis delivered anything to anybody.

The Court should reverse the convictions.

2. THE WARRANT TO SEARCH DAVIS'S ROOM LACKED PROBABLE CAUSE.

No warrant may issue except upon probable cause. Wash. Const. art. 1, § 7; U.S. Const. amend. IV; *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999), citing *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). The privacy protection provided by our Constitution is greater than that of the Fourth Amendment. *State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. 1, § 7. Evidence seized in violation of art. 1, § 7 is inadmissible. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

"Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." *Thein*, 138 Wn.2d at 140, citing *State v. Dalton*, 73 Wn. App. 132, 136, 868 P.2d 873 (1994). The existence of probable cause is a legal question which a

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reviewing court considers de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007).

A lawful warrant to search a dwelling requires that a reasonable magistrate be able logically to infer ongoing criminal activity from the facts in the affidavit. *State v. Lyons*, 174 Wn.2d 354, 362, 275 P.3d 314 (2012). "Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Dorman v. United States*, 140 U.S. App. D.C. 313, 317, 435 F.2d 385 (1970). And the fact that an intrusion takes place in a high crime area does not suspend the need for probable cause. *State v. Diluzio*, 162 Wn. App. 585, 591, 254 P.3d 218 (2011).

The State implies that probable cause to issue a search warrant is sufficient if the warrant affidavit merely alleges "controlled buys" like some sort of "Open Sesame." BR 22. This is wrong. The warrant affidavit must establish that the buys were in fact controlled.

The search warrant here was sought and issued for Room 102. The affidavit begins with two pages of general habits of drug dealers. CP 263-64. This is completely irrelevant. *Thein*, 138 Wn.2d at 140. It then describes two alleged buys in Room 108 and White's alleged "bunk" buy in the motel parking lot. CP 268; RP 366.

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But probable cause to search Room 102 must rest on the White transaction on January 14, 2012, because that is the only one alleged to be associated with the place to be searched. RP 215, 218; CP 265.

The State seems to imply that a warrant based on illusory probable cause established by an illusory controlled buy is lawful if the resulting search produces evidence of a crime and discusses alleged drug activity discovered elsewhere at the Chieftain in the course of executing the warrant on January 18th — as if to suggest that this information was relevant to the probable cause inquiry based on statements from informants regarding events on November 16, December 3, and 30, and January 14. BR 10. This is wrong. Gaps in probable cause cannot be filled in with evidence obtained after the defective warrant is served.

A search or seizure must be lawful at its inception, which means its validity rests solely on the information known to the police at the time the affidavit is presented to the magistrate. "The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search." *State v. Hopkins*, 128 Wn. App. 855, 865, 117 P.3d 377 (2005), quoting *Florida v. J.L.*, 529 U.S. 266, 271, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000). That is, the warrant must justify the search, not vice versa; information obtained after the suspect's arrest is not relevant.

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The Chieftain was notorious as a close-knit community of drug traffickers. RP 232. Controlled buys were ongoing in multiple rooms. RP 230-231. Therefore, without observing Sutton and White enter and leave Davis's room, Musselwhite had no knowledge whatsoever of their activities. Accordingly, the affidavit could not possibly contain sufficient evidence that either of them even saw Davis, let alone bought drugs from her.

Without the evidence obtained pursuant to the invalid warrant, there was no corroboration for the trial testimony of the two informants. It is highly likely that the physical evidence affected the verdict of at least one of the jurors. The sole remedy is to reverse.

3. THE COURT EXCLUDED CRUCIAL BIAS EVIDENCE.

The trial court erred in ruling that evidence of Sutton and White's proclivity and motives for lying, and their opportunity to fabricate evidence against Davis was "collateral" and that its probative value was outweighed by its prejudice to the prosecution. RP 30.

Due process demands that criminal defendant be able to introduce evidence of witness bias. *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). "The denial of a criminal defendant's right to

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adequately cross-examine an essential state witness as to relevant matters tending to establish bias or motive will violate the Sixth Amendment's right of confrontation, made applicable to the states by the Fourteenth Amendment." *Roberts*, 25 Wn. App. at 834, citing *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). In addition, the confrontation clause of Wash. Const. art. 1, § 22 guarantees criminal defendants great latitude in cross examining the prosecution's witnesses, particularly regarding motive and credibility. S*tate v Wilder*, 4 Wn. App. 850, 854, 486 P.2d 319 (1971).

The sole limitation on questions designed to uncover witness bias is that the inquiry must be made in good faith. 5A KARL B. TEGLAND, WASHINGTON PRACTICE — EVIDENCE LAW AND PRACTICE, 5th ed (2007), at 396. The evidence cannot be repetitive and completely irrelevant or constitute harassment, prejudice, or confusion of the issues. *Fisher* at 752; *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983). Where, as here, the witness is essential to the prosecution's case, great latitude should be granted to explore fundamental elements such as motive, bias and credibility. *Darden*, 145 Wn.2d at 619.

A court's bias rulings are reviewed for manifest abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

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The Court will reverse a decision that rests on untenable or unreasonable grounds. *State v. Dixon*, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006).

Davis wanted to introduce evidence that Sutton was dealing drugs during the entire period encompassed by the alleged Davis buys, that her best friend, Barbara Ivy, lived at the Chieftain, and that Ivy was supplying Sutton with drugs before and during the Davis buy period. RP 113-16.

The State claims that this evidence was relevant solely for impeachment, as the trial court erroneously believed when it ruled it was "collateral" and that other impeachment evidence was available. RP 40-41, 44. This is wrong.

This evidence was not offered merely for impeachment. The fact that Sutton was freely buying and selling drugs throughout the relevant period from her best friend inside the Chieftain constitutes compelling grounds for reasonable doubt as to how, where, and with whom Sutton interacted once she left the parking lot and Musselwhite's purported controls broke down.

The State persuaded the trial court that to admit evidence that the controls of the Sutton buys were inadequate would oblige the court to also admit Sutton's claim of a prior drug transaction with Davis. RP 122. The court failed to see a distinction, ruling that "what's good for the goose is good for the gander." RP 124. But no Rule of Evidence excludes facts

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regarding Sutton's drug-related activities offered to refute the essential allegation that these buys were controlled. By contrast, evidence regarding an unrelated buy from Davis has no relevance to any fact at issue and is inadmissible propensity evidence. ER 404(b). (As defense counsel argued, RP 122.)

Robert White was prone to steal drugs during controlled buys as he did in the January 14 buy that served as probable cause for the search warrant and about which he lied until the trial. Davis wanted the jury to know that White did the same thing again in a subsequent investigation. RP 47-48. Again, the court ruled that the subsequent incident was collateral because it did not involve Ms. Davis. RP 50. But the fact that White routinely lied to, cheated and stole from these officers at every opportunity was relevant evidence of bias.

Davis had the right to cross examine these witnesses about their cavalier attitude toward their agreements with the police, their motive to lie and their incentive and opportunity to manufacture evidence with which to satisfy Musselwhite.

The erroneous exclusion of bias evidence is presumed prejudicial unless the State can meet the constitutional harmless error standard. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). The State must show beyond a reasonable doubt that the defendant would have been

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convicted even if there had been no error. *State v Fitzsimmons*, 93 Wn.2d 436, 452, 610 P.2d 893 (1980), *overruled on other grounds by City of Spokane v Kruger*, 116 Wn.2d 135, 803 2Pd 305 (1991); *State v Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998).

Reversal is required.

4. THE ERRONEOUS ADMISSION OF SUTTONS HEARSAY WAS NOT HARMLESS.

The trial court erroneously overruled a defense objection to inadmissible hearsay testimony from Musselwhite that Sutton told him she telephoned Davis and asked if she had any meth to sell and that Davis told Sutton she did. RP 166. The State claims this was harmless. BR 37. This is wrong. Evidence that the defendant said she was ready, willing and able to commit the charged offense cannot be characterized as harmless.

Hearsay may be admitted under a legitimate exception, provided the court gives a limiting instruction. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). This evidence does not fall under any hearsay exception. The court erroneously admitted it to illuminate Musselwhite's state of mind. RP 166. But the thought processes of the police do not fall into any admissible category of hearsay because the subjective

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motivations of the police are not in controversy. ER 401; *State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006).

Moreover, the court did not give a limiting instruction. Therefore, it is likely that one or more jurors regarded the alleged statement as substantive evidence of guilt. The court obviously perceived this evidence as problematic because it limited the State to only a couple of questions about it. RP 190. But either the evidence was admissible, or it was not. If it was, there was no reason to limit the State's use of it.

This is reversible error.

5. IF THE EVIDENCE IS SUFFICIENT THAT DAVIS VIOLATED THE UNLAWFUL USE OF A BUILDING STATUTE, THEN THE STATUTE IS UNCONSTITUTIONALLY VAGUE AS APPLIED.

The RCW 69.53.010(1) provides that, to convict a person for unlawful use of a building for drug purposes, the State must prove beyond a reasonable doubt that "as an owner, lessee, agent, employee, or mortgagee" of a building, room, space, or enclosure, the defendant knowingly rented, leased, or made available for use the building, room, space, or enclosure for drug purposes." Davis is not accused of renting or leasing her room. Therefore, she must have made the room available.

The Legislature criminalized three acts — to rent, to lease and to make available for use. This indicates that the premises must be rented,

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leased, or made available to another person. Here, by contrast, the charge that Davis made her premises available is based solely on the fact that another person was present in the room at the time of an alleged drug offense.

Davis also contends that, if the State's interpretation is correct, the statute is unconstitutionally vague as applied. Due process does not permit criminal statutes to "contain no standards and allow police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any given case." *State v. Maciolek*, 101 Wn.2d 259, 267, 676 P.2d 996 (1984). If the Legislature intended to increase the penalty for a drug offense committed by the defendant whenever another person is present, the Constitution requires this to be set forth clearly enough for an ordinary person to understand this. *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990).

Here, even if admissible evidence established that Davis engaged in unlawful activity, this cannot be characterized as making her room available.

At minimum, if the Court deems this penal statute ambiguous, the rule of lenity requires the construction that favors the defendant, absent legislative intent to the contrary. *State v. Jacobs*, 154 Wn.2d 596, 601,

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115 P.3d 281 (2005). Accordingly, the Court should reverse this conviction.

6. THE EVIDENCE WAS INSUFFICIENT TO PROVE A SCHOOL ZONE ENHANCEMENT.

The closest school bus stop to the Chieftain is not within 1,000 feet as measured from point A to point B on the ground. Rather, it is within a 1,000-foot radius of a circle drawn on an aerial map with the Chieftain at its center. RP 432- 434. The State cites to no authority in contending that this statute applies to any school bus stop within a 1,000-foot radius of a circle inscribed on an aerial photo with the crime scene at its center. BR 43.

This is not how the elements of a school bus stop violation under RCW.69.50.435(1)(c) is established. It extends the penalty beyond the legislative intent and is contrary to accepted canons of statutory construction.

School Bus Stop: Had the legislature meant to penalize activity within a 1,000-foot radius, it would have said a 1,000-foot radius. It does not; it says within 1,000 feet. RCW 69.50.435(1)(c).

Statutes must be construed so that no portion is rendered meaningless or superfluous. *State v. Marohl*, 170 Wn.2d 691, 699, 246 P.3d 177 (2010). If the purpose of school zone enhancements is to protect

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our children from predation by drug traffickers, then the entire statute is superfluous with respect to a particular school if the offender "can't get there from here."

It was physically impossible to travel for 1,000 linear feet between the Chieftain and anything that could be construed as a school zone because of insuperable obstacles. RP 639. Thick brush, tall fences, steep drops, high walls and a video store intervened. RP 265. Musselwhite knew the standard was ground measurement because he used a wheel to locate the West Sound Technical Skills Center. He would hardly have bothered if he really believed his aerial maps could save him the trouble.

If the prosecutor's novel interpretation is correct, the State could impose school zone enhancement if a school or bus stop was on the opposite bank of the Columbia River with no bridge. This is wrong. Since schools and drug offences exist on the ground, school zones must be measured on the ground, not in the air.

The State unnecessarily introduces ambiguity into a statute the police and offenders have understood and applied consistently for many years. Moreover, if the statute were ambiguous, the rule of lenity would require it to be construed in favor of the defendant. *Jacobs*, 154 Wn.2d at 601.

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School: Criminal statutes are strictly construed. *State v. Wilson*, 125 Wn.2d 212, 216-17, 883 P.2d 320 (1994). Courts must interpret the law as it is written, not as it could or should have been written. *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). A Court may not change statutory language, "even if it believes the legislature intended something else but failed to express it adequately." *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997).

The State contends that the enhancement applies if an offense occurs within 1,000 feet of a school. BR 43. This is wrong. The statute does not say a school. It says the school. RCW 69.50.435.

The distinction between "a" and "the" is critical to judicial interpretation of criminal statutes. *See, e.g., State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000) ("a" crime versus "the" crime in the context of accomplice liability.) Here, the last antecedent rule identifies the school to which the legislature was referring. *See State v. Wentz*, 149 Wn.2d 342, 351, 68 P.3d 282 (2003). The last antecedent is the school attached to the aforementioned bus stop. RCW 69.50.435(1)(d). The only school within a 1,000 foot radius of the Chieftain is the West Sound Technical Skills Center. RP 435. This school does not satisfy the elements of RCW 69.50.435(1)(d), because it is not within 1,000 feet of the bus stop, that is, the stop that serves Mountain View Middle School.

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At best, the statute is ambiguous and the rule of lenity requires the that the sentencing enhancements be vacated.

IV. CONCLUSION

For the foregoing reasons, the Court should reverse Ms. Davis's convictions, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted, this 15th day of October, 2012,

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CERTIFICATE OF SERVICE

This Appellant's Opening Brief was served upon opposing counsel by e-mail via the Division II upload portal:

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